STATE OF MICHIGAN

IN THE SUPREME COURT

CZYMBOR'S TIMBER, INC., a Michigan corporation, and MICHAEL CZYMBOR, an individual,

Plaintiffs-Appellants,

v

CITY OF SAGINAW, a Municipal corporation, SAGINAW CITY COUNCIL, and DEBORAH KIMBLE, City Manager, jointly and severally,

Defendants-Appellees.
/

Supreme Court Case No. 130672

Court of Appeals Case No. 263505

Saginaw County Circuit Court
Case No. 03-050339-CH-3

John J. Bursch (P57679)
Joseph M. Infante (P68719)
WARNER NORCROSS & JUDD LLP
111 Lyon Street, N.W., Suite 900
Grand Rapids, Michigan 49503-2487
616.752.2474
616.222.2474 (fax)
Counsel for Plaintiffs-Appellants

Thomas Fancher (P36788)
Saginaw City Attorney
1315 S. Washington Ave. #110
Saginaw, Michigan 48601-2513
989.759.1550
Counsel for Defendants-Appellees

Scott C. Strattard (P33167)
BRAUN KENDRICK FINKBEINER P.L.C.
4301 Fashion Square Boulevard
Saginaw, Michigan 48603
989.498.2100
Counsel for Defendant-Appellee

BRIEF OF PLAINTIFFS-APPELLANTS CZYMBOR'S TIMBERS, INC., AND MICHAEL CZYMBOR

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Statutes

Other Authorities

Page

BASIS OF JURISDICTION AND RELIEF REQUESTED

Czymbor's Timber, Inc., and Michael Czymbor (collectively "Czymbor's") appeal under Michigan Court Rule 7.301(A)(2) the decision of the Court of Appeals in *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551; 711 NW2d 442 (2006). This Court granted Czymbor's Application for Leave to Appeal on July 21, 2006.

Czymbor's asks this Court to reverse the Court of Appeals, which incorrectly chose not to follow this Court's preemption jurisprudence and eviscerated MCL 324.41901, a statute that vests in the Michigan Department of Natural Resources ("DNR") exclusive power to regulate and prohibit hunting "and the discharge of firearms and bow and arrow" within the State.

QUESTIONS INVOLVED

1. Whether the Saginaw City Ordinances, which prohibit the discharge of firearms and other weapons within the city limits, are preempted by the hunting control act or other state statutes that regulate the prohibition of hunting "and the discharge of firearms and bow and arrow" in the State?

The Court of Appeals answered: No.

The trial court answered: No.

Appellants answer: Yes.

Authority: MCL 324.41901(1), (2) (DNR has the power to regulate and prohibit "hunting, and the discharge of firearms and bow and arrow"); MCL 324.41902 (any ordinance that a local government seeks to enact with respect to hunting must "be identical in all respects to the regulations prescribed by the department"); MCL 324.40113a (DNR's regulatory power over hunting is "exclusive").

2. Must a court look beyond the words used in a local ordinance and examine the ordinance's substantive effect when conducting a preemption analysis?

The Court of Appeals answered: No.

The trial court answered: No.

Appellants answer: Yes.

Authority: *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2 902 (1977) (there is preemption when an "ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits").

INTRODUCTION

This dispute arises out of the City of Saginaw's attempt to ban all hunting on a 56-acre parcel of private property within the City limits. The City's ban violates the Michigan Legislature's command that the Michigan Department of Natural Resources ("DNR") shall have the exclusive power to "regulate and prohibit hunting, and the discharge of firearms and bow and arrow" within the State. MCL 324.41901(1); MCL 324.40113a. Although a local governing body may request that the DNR close an area to hunting for safety or other reasons, MCL 324.41901(1), it is ultimately the DNR—not the local government—that "shall" prescribe regulations necessary to alleviate any safety problems, including an absolute hunting prohibition. MCL 324.41901(1), (2).

Here, the City of Saginaw ("City") enacted ordinances that prohibit the discharge of firearms or bows (as well as trapping) within the City's limits. The City has conceded since the beginning of this litigation, as it must, that its ordinances "indirectly prevent" hunting that involves the discharge of firearms and bows and arrows, the very subject matter that MCL 324.41901 regulates. The principal issue presented, then, is whether the City may lawfully circumvent the statutorily proscribed procedures, which require public hearings and testimony, and DNR-promulgated regulations that the City may then adopt.

This Court should answer that question "no." Hundreds of other local governments, including Saginaw County and Saginaw Township, have successfully used the statutory procedures to obtain DNR restrictions or outright bans on hunting in certain (or all) areas within their jurisdictions. Plaintiffs do not seek to bar local governments from enacting anti-discharge ordinances entirely; rather, they seek recognition that such ordinances must

contain a hunting exception, thus preventing a local government from making an end run around the mandatory, statutory procedures, and the public hearings they entail.

STATEMENT OF FACTS AND PROCEEDINGS

Plaintiffs' Property and Its Use

Plaintiff Czymbor's Timber, Inc., owns a 56-acre parcel of property located within the City of Saginaw. (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶ 2, App 42a.) No residential property abuts the parcel (Verified Compl ¶ 9, App 8a), and the property has been used for hunting for many years (*id.*). Indeed, Czymbor's reason for buying the property was to manage the land agriculturally and for the private use of the owner's family to hunt deer and other game that inhabit it. (*Id.*)

Plaintiff Michael Czymbor is a member of the Czymbor family and an agent of Czymbor's Timber. (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶ 1, App 42a.) Mr. Czymbor personally hunted deer on the property in 1999, 2000, 2001, and 2002, thereby helping to reduce the deer population that the DNR had determined to be excessive. (*Id.* ¶¶ 4, 8, App 42a, 43a; Verified Compl ¶¶ 11, 19, App 9a, 10a.) Plaintiffs have complied with state law in their hunting activities (Verified Compl ¶ 20, App 10a), and they have taken precautions, including the construction of 12-foot-high dikes and the use of elevated platforms, to ensure that hunting projectiles will not cross the property line onto adjacent property. (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶¶ 11-12, App 44a; Verified Compl ¶¶ 26-27, App 12a.)

The DNR's policies regarding deer management and the control of deer populations through hunting address concerns such as car-deer accidents, the potential for an outbreak of disease, and damage to agricultural crops. (Verified Compl ¶ 36, App 14a-15a.) The

DNR has, in fact, issued "crop damage permits" to Plaintiffs in the past for the purpose of culling excess deer. (*Id.* ¶ 37, App 15a.)

State Regulation of Hunting

The Michigan Legislature has found and declared that the "wildlife populations of the state . . . are of paramount importance to the citizens of this state." MCL 324.40113a(1)(a). In addition, the "sound scientific management of the wildlife populations of the state" is "in the public interest." MCL 324.40113a(1)(b). Rather than leave the regulation of hunting in the hands of local government officials, the Legislature granted to the DNR "the exclusive authority to regulate the taking of game." MCL 324.40113a(2) (emphasis added).[1] The Legislature considers this regulatory area so important to state law and the economy that it requires the DNR to provide copies of proposed regulatory orders to each member of each standing committee of the Legislature that pertains to conservation, the environment, natural resources, recreation, tourism, or agriculture; the chairperson of the senate and house appropriations committees; and the members of the house and senate appropriations subcommittees that consider the DNR's budget. *Id.*

The DNR's regulatory power is itself comprehensive and pervasive. For example, the Legislature has delegated to the DNR the power to establish hunting seasons and hours, lawful methods of taking game, bag limits, permit conditions, and license fees. MCL 324.40107. In addition, the Legislature has delegated solely to the DNR the specific power to

[1] The Legislature broadly defined "Game" to include badger, bear, beaver, bobcat, brant, coot, coyote, crow, deer, duck, elk, fisher, Florida gallinule, fox, geese, hare, Hungarian partridge, marten, mink, moose, mourning dove, muskrat, opossum, otter, pheasant, quail, rabbit, raccoon, ruffed grouse, sharptailed grouse, skunk, snipe, sora rail, squirrel, weasel, wild turkey, woodchuck, woodcock, and Virginia rail. MCL 324.40103(1).

define and regulate areas that present a special safety concern for "hunting, and the discharge of firearms and bow and arrow":

> In addition to all of the department powers, in the interest of public safety and the general welfare, the department may regulate and prohibit hunting, and the discharge of firearms and bow and arrow, as provided in this part, on those areas established under this part where hunting or the discharge of firearms or bow and arrow may or is likely to kill, injure, or disturb persons who can reasonably be expected to be present in the area or to destroy or damage buildings or personal property situated or customarily situated in the area or will impair the general safety and welfare.

MCL 324.41901(1) (emphasis added). And, while a local government entity may *request* that the DNR ban firearm or bow discharge completely within a specified area to promote public safety, the Legislature has made clear that it is the DNR—not the local government—that ultimately has the power to decide if such a ban is apprpriate:

> Whenever the governing body of any political subdivision determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows, by resolution it may request the *department* to recommend closure of the area as may be required to relieve the problem. Upon receipt of a certified resolution, the department shall establish a date for a public hearing in the political subdivision, and the requesting political authority shall arrange for suitable quarters for the hearing. The department shall receive testimony on the nature of the problems resulting from hunting activities and firearms use from all interested parties on the type, extent, and nature of the closure, regulations, or controls desired locally to remedy these problems.
>
> Upon completion of the public hearing, the department shall cause such investigations and studies to be made of the area as it considers appropriate and shall then make a statement of the facts of the situation as found at the hearing and as a result of its investigations. *The department shall then prescribe regulations* as are necessary to alleviate or correct the problems found.

MCL 324.41901(1), (2) (emphasis added). To remove any doubt on this issue, the Legislature further specified that any ordinance a local government seeks to enact must "be identical in all respects to the regulations prescribed by the department." MCL 324.41902 (emphasis added).

In accord with this legislative mandate, the DNR's regulations contain more than 100 areas subject to DNR hunting restrictions or bans. *See* Mich Admin Code r 317.101.1 – 317.182.12. Ironically, those regulations include restrictions in portions of Saginaw County, Mich Admin Code r 317.173.1, and Saginaw Township, Mich Admin Code r 317.173.2. In stark contrast, the City of Saginaw ignored the statutory process and unilaterally banned all firearms and bow discharges within City limits, without providing an exception for the taking of game.

The City Ordinances

In February 2002, the Saginaw City Council passed Saginaw City Ordinance 130.02, which states that "[n]o person shall discharge or propel any arrow, metal ball, pellet, or other projectile by use of any bow, long bow, cross bow, slingshot, or similar device within the City limits." This ordinance supplemented Saginaw City Ordinance 130.03, which states that "it shall be unlawful for any person to discharge a firearm in the City," and Saginaw City Ordinance 94.05, which prohibits trapping. By failing to provide any exception for hunting, these ordinances collectively prohibit the very conduct that only the DNR is supposed to regulate: "hunting, and the discharge of firearms and bow and arrow."

At the February 25, 2002, City Council meeting where the ordinance was passed, there was testimony that a previous City ordinance banning hunting within the City was unenforceable because the DNR controls hunting (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶ 6, App 42a-43a), and that the ordinance was contrary to MCL 324.92011 and MCL 324.41901 (Verified Compl ¶ 28, App 12a-13a). Legal counsel then advised the City Council

that if the ordinance simply dropped the word "hunting" and instead banned the discharge of firearms or bows generically, the objective of banning all hunting in the City could be accomplished without appearing to be a facial violation of MCL 324.41901. (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶ 6, App 42a-43a; Verified Compl ¶ 28, App 12a-13a.)

Following passage of the City's ordinance in 2002, the DNR denied Mr. Czymbor a hunting permit, because the City purported to bar hunting within the City limits. (Czymbor Aff in Support of Mot for TRO and Prelim Inj ¶ 9, App 43a.) The DNR has stated that if hunting is restored to the property, it will issue the requested permits. (*Id.*)

Proceedings Below

Defendant moved for summary disposition, and the trial court held a hearing on October 18, 2004. In an exchange with the City's counsel, the trial court expressed its concern that state law did in fact preempt the City's authority to enforce the anti-hunting ordinances, and that the City's remedy was to follow the statutory procedures and request that the DNR close an identified area to hunting:

> THE COURT: There is a sentence in the statute allowing the DNR to regulate and prohibit hunting that concerns the Court . . . "Whenever the governing body of any political subdivision determines that the safety"—so, obviously, we're talking about whenever the city council "determinates that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bows and arrows, by resolution it may request the department to recommend closure of the area." Does this sentence not indicate then that there is preemption?
>
> MR. FANCHER: Your Honor, I think not. For one thing, it importantly says it may, suggesting that there are other methods available to it. And it certainly is an option available to it. If it wants to allow a certain form of hunting in the city, then it would have to go to the DNR, and they would go through a process to see what kind of hunting is allowed inside the city, if any. But that does not by itself prohibit the ban of all discharge of weapons.

> THE COURT: This is when hunters endanger the well-being of persons. All right? We're not talking about felons being a threat to the well-being of persons. We're not talking about robbers or drug dealers or anything else. We're talking about when the city believes that hunters are a threat, then the city "may request the department to recommend closure of that area." You don't think that this is preemption language?
>
> MR FANCHER: No . . . .

(Trial Ct Tr at 19-20 (emphasis added), App 84a-85a.) But, in its Opinion and Order Granting the Defendants' Motion for Summary Judgment, the trial court changed course and looked to the City's proffered *purpose* for passing the ordinances, rather than the ordinances' *effect*:

> The City of Saginaw has an important interest in protecting its citizens and a right to regulate the discharge of firearms under its police powers, which exceeds the interests of hunting. The purpose of enacting these ordinances is based upon safety and not to indirectly regulate hunting . . . . Firearm control is a subject distinct from the field of hunting, and the DNR Act does not preempt the local ordinances enacted by the City of Saginaw.

(Nov 24, 2004, Op, pp 3-4, App 90a-91a.) The trial court denied Plaintiffs' motion for reconsideration on June 2, 2005, and Plaintiffs appealed.

The Court of Appeals affirmed, following *Michigan United Conversation Club v City of Cadillac*, 51 Mich App 299; 214 NW2d 736 (1974) ("*Cadillac*"). In *Cadillac*, the court upheld a Cadillac City ordinance that likewise prohibited firearm and bow discharge without a hunting exception, because MCL 324.41901's predecessor did not apply to cities. *Id.* at 303; 214 NW2d 736. But the court also stated, in *dicta*, that firearm control is a "separate and distinct subject" from hunting. *Id*. at 301; 214 NW2d 736. The Court of Appeals here adopted that *dictum*, seeing no reason "to distinguish *MUCC*'s holding that firearm control is a subject distinct from the field of hunting control." (Jan 26, 2006, Op, p 6, App 99a.)

In so ruling, the Court of Appeals failed to discuss why the Legislature would articulate the detailed process the Legislature prescribed in MCL 324.41901 if local governments could simply enact absolute firearm and bow discharge prohibitions unilaterally. The Court of Appeals also failed to discuss this Court's holding in *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), that state preemption is not a semantic game that local governments can win by choosing the right words, but rather is a substantive examination to determine whether "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* at 322 n 4; 257 NW2d 902. The practical effect of the Court of Appeals' ruling is to nullify MCL 324.41901's requirements, thus circumscribing the DNR's delegated power and unsettling state preemption jurisprudence in the process.

STANDARD OF REVIEW

Whether a state statute preempts a local ordinance is a question of statutory interpretation and, thus, a question of law that this Court reviews *de novo*. *Michigan Coal for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). A state law preempts a local ordinance where the ordinance directly conflicts with the state statute or the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997).

ARGUMENT

Under this Court's preemption jurisprudence, a local government is precluded from enacting an ordinance if (1) the ordinance is in direct conflict with the state statutory scheme, or (2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the local government seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. *Llewellyn*, 401 Mich at

322. In making these determinations, courts should consider whether state law expressly provides that its authority is exclusive, whether the pervasiveness of the state regulatory scheme supports a finding of preemption, and whether the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose. *Id*. at 323-325. Importantly, a local ordinance need not expressly reference the subject matter of a state law to be in "direct conflict" with it. Rather, a "direct conflict exists under these cases when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id*. at 322 n 4. Michigan courts have routinely applied the preemption doctrine and rejected attempts by local municipalities to prohibit operations or activities within their borders that are incompatible with State law. *See, e.g*., *Southeastern Oakland Co Incinerator Auth v Township of Avon, et al*, 144 Mich App 39; 372 NW2d 678 (1985); *Township of Cascade v Cascade Res Recovery, Inc*, 118 Mich App 580; 325 NW2d 500 (1982).

Here, the City's ordinances are preempted in two distinct ways. First, the ordinances are in direct conflict with MCL 324.41901(1), (2) and MCL 324.41902, which collectively provide a DNR-administered public process when a local government would like to ban hunting or the discharge of firearms and bow and arrow. Second, the City's ordinances are field preempted. MCL 324.40113a(2) grants to the DNR "the exclusive authority to regulate the taking of game" and is supplemented by numerous other statutes that similarly give the DNR broad regulatory control over hunting. Either way, the City's ordinances are preempted by State law because they fail to contain an exception for hunting.

I. The City of Saginaw's Ordinances Are in Conflict with MCL 324.41901(1), (2) and MCL 324.41902.

A. Petitioning the DNR is the exclusive means for a local government to ban hunting.

The Legislature has recognized that cities and other municipal governments may feel the need to close certain areas for hunting. Accordingly, the Legislature has prescribed a statutory procedure by which a municipality may work with the DNR to create an ordinance restricting hunting and the discharge of firearms and bows within a particular area. Specifically:

> Whenever the governing body of any political subdivision determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows, by resolution it may request the department to recommend closure of the area as may be required to relieve the problem.

MCL 324.41901(1) (emphasis added). It is then the DNR's responsibility to hold a public hearing, receive public testimony, make a statement of facts, and "prescribe regulations as are necessary to alleviate or correct the problems found." MCL 324.41901(1), (2). This statute squarely applies to the concerns of the City of Saginaw, and it indicates the Legislature's clear intent to make the DNR the final authority on hunting and the discharge of firearms and bows. Requiring cities to work with the DNR is consistent with the regulatory scheme that entrusts the control of hunting and firearms to that department.

The City has argued that the use of the word "may" in the statute indicates that cooperation with the DNR is optional, and that the State permits cities to regulate or prohibit hunting without consulting the DNR. (*See, e.g.,* Defs' Br in Opp'n to Pls' Appl'n for Leave to Appeal at 7.) This argument fails for two fundamental reasons.

First, the City's argument is countered by the fact that the statutory scheme itself prohibits a city from deviating from the DNR's recommendations:

> If the governing body disapproves the prescribed controls, further action shall not be taken. If the governing body approves the prescribed controls, a local ordinance shall be enacted in accordance with the provisions of law pertaining to the enactment of ordinances, which ordinance shall be identical in all respects to the regulations prescribed by the department.

MCL 324.41902 (emphasis added). In other words, a municipal government has no discretion whatsoever to contradict, vary, reduce, or enlarge any controls prescribed by the DNR. The statute clearly indicates that it is the prerogative of the DNR to dictate the contents of any ordinance concerning hunting or the discharge of firearms or bows. If the City of Saginaw is correct that compliance with that statute is optional or precatory, then the statute would be of no value whatsoever; no local government would voluntarily cede control over hunting and firearms to the DNR if it were possible to engage in unfettered regulation simply by avoiding consultation with the DNR in the first place. By articulating a clear and detailed statutory procedure, the Legislature has indicated cities must work with the DNR to close hunting areas, not apart from it. Accepting the City of Saginaw's arguments will render the procedure for consultation with the DNR meaningless, and defeat the Legislature's intent in enacting MCL 324.41901.

Second, the context of the statute's plain language indicates that "may request the department to recommend closure" means a city "must" make such a request, or do nothing at all. While the word "may" is generally permissive, it is often interpreted as a word of command. *Metro v Amway Asia Pacific Ltd*, 2006 WL 2035510 at *3 (Mich Ct App, July 20, 2006), citing *Mull v Equitable Life Assurance Soc of the United States*, 444 Mich 508, 519; 510 NW2d 184 (1994); *Fink v City of Detroit*, 124 Mich App 44, 49; 333 NW2d 376 (1983). "Most significantly, a grant of discretion whether to do one thing does not constitute a grant of discretion to do any other particular thing." *Id*. MCL 324.41902's context indicates that "may

request the department to recommend closure" means a city "must" make such a request or do nothing at all.

This point is illustrated by the Court of Appeals' decision in *Fink*. There, the court considered the meaning of Detroit City Code section 21-7-2, which provided that "[a]ny person considering himself aggrieved by reason of any [tax] assessment may make complaint on or before February 15th . . . ." 124 Mich App at 47; 333 NW2d 376 (emphasis added). The court held that:

> The context of the use of the word "may" shows that the use was not intended to create a voluntary proceeding before the board of assessors. Section 21-7-2 provides the mechanics to initiate proceedings before the assessors. The party who "may" make complaints must do so in writing on or before February 15 of the year.
>
> * * *
>
> [The City] has, by ordinance, established only one procedure to review assessments, a procedure that requires a hearing before the board of assessors. The obvious inference that can be drawn is that there are no original proceedings before the board of review.

Id. at 49-51; 333 NW2d 376 (emphasis added).[2]

Similarly here, the Legislature has established only one procedure for the closure of an area to hunting. A local government "may" invoke the procedure if it desires, but if it does not, it has no other remedy. It is not authorized to make an end run around the statute by

[2] *See also De Beaussaert v Shelby Township*, 122 Mich App 128, 131-132; 333 NW2d 22 (1982) ("'may' . . . is often interpreted to mean 'shall'"); *Cooper Indus v Aviall Servs, Inc*, 125 S Ct 577, 583 (2004) (the provision "Any person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title" is mandatory, in that it authorizes certain contribution actions—ones that satisfy the subsequent specified conditions—and no others); *Chapple v Fairmont Gen Hosp, Inc*, 384 SE2d 366, 372 (W Va, 1989) ("A review of federal labor law reveals almost uniform interpretation that 'may arbitrate' means 'must arbitrate or abandon.' Consequently, the appellant is incorrect in her assumption that she has a choice between arbitrating her claim or filing a lawsuit.").

purporting to ban the discharge of all firearms and bows and arrows within its jurisdiction. That is why the DNR's regulations are replete with more than 100 discrete areas subject to DNR-ordered hunting restrictions or outright bans, *see* Mich Admin Code r 317.101.1–317.182.12, including restrictions in portions of Saginaw County, Mich Admin Code r 317.173.1, and Saginaw Township, Mich Admin Code r 317.173.2. The Court of Appeals in its Opinion failed to explain what purpose the statute could possibly serve if local governments could circumvent it by passing ordinances like the City of Saginaw's. Czymbor's respectfully requests that this Court hold that a local government enacting an anti-discharge ordinance must either create an exception for hunting, or petition the DNR for closure in compliance with the statutory scheme.

B. Local governments cannot seek to do indirectly that which a statute regulates directly.

In support of its decision, the Court of Appeals relied heavily on *Michigan United Conservation Clubs v Cadillac*, 51 Mich App 299; 124 NW2d 736 (1974). The *Cadillac* court held that the City of Cadillac could prohibit the discharge of firearms within the city limits. However, reliance on that decision is misplaced. The *Cadillac* decision is entirely premised on a statute that has since been repealed and replaced, and it would have been decided differently under this Court's decision in *Llewellyn* at 322 n 4; 257 NW2 902 (1977), decided three years after *Cadillac*.

The specific question at issue in *Cadillac* was "whether Act 159 of 1967 [the Hunting Area Control Act] overrides the specifically granted police power of the City of Cadillac and prescribes the exclusive means for firearm control therein." 51 Mich App at 302; 214 NW2d 736. The *Cadillac* court held it did not, because the Act applied only to townships, not cities:

> There is no reference at any place in the act to cities, nor is there any provision for committee membership from the cities or city

> law enforcement agencies. It is to be concluded that . . . the act is inapplicable to cities.

Id. at 303; 214 NW2d 736. The holding in *Cadillac* is now irrelevant because the Legislature repealed the Hunting Control Act in 1995 (Public Act 57 of 1995, effective May 24, 1995), and the Legislature replaced the Act with hunting area control provisions that apply to "any political subdivision" of the state, thereby overruling *Cadillac* and extending the application of the act to cities. *See* MCL 324.41901, *et seq*. The *Cadillac* opinion is thus no longer viable, and the Court of Appeals should not have relied upon it in upholding the ordinances.

In addition, *Cadillac* was decided in 1974, three years before this Court handed down its decision in *Llewellyn*. As a result, the *Cadillac* court did not have the benefit of this Court's test for assessing whether a direct conflict exists between a statute and an ordinance, i.e., whether the ordinance prohibits that which state law permits, or permits that which state law prohibits. Instead, the court asserted that while cities may not regulate hunting because the state has preempted the field, "the separate and distinct subject of firearm control would be a matter of local interest and a proper subject of local police-power legislation." 51 Mich App at 301; 214 NW2d 736. This statement has no bearing on the test this Court set forth in *Llewellyn*, which looks not to a local government's purpose or intent in enacting an ordinance, but at the local ordinance's effect. The proper inquiry is whether the City of Saginaw's ordinance prohibits a licensed hunter to take game (which state law permits), or whether the ordinance results in the City's banning of hunting and the discharge of firearms and bow and arrow (which state law prohibits). Because the ordinance interferes with state law in both respects, it is invalid.

This preemption conclusion is supported by an opinion of the Michigan Attorney General addressing ordinances that were nearly identical to those enacted by the City of Saginaw. Lansing Township, the Village of Novi, and Portage Township each proposed to pass

ordinances that similarly prohibited the discharge of firearms (and, in the case of Lansing, bows and arrows) within their governmental limits. The governments asked: "Can a township adopt ordinances regulating the discharge of firearms so as to interfere with or restrict the hunting of wild birds and animals with firearms permitted or prescribed by State law?" The Attorney General unequivocally answered "no":

> The township ordinances regulating the discharge of firearms within township limits conflict with State regulation of game and use of firearms. Is the grant of power to a township to adopt ordinances regulating health and safety sufficient authority to permit them to pass firearm ordinances which might affect hunting? It is my conclusion that it is not . . . . My opinion is that township ordinances similar to those enacted by Lansing Township, Village of Novi, and Portage Township directly affect the State hunting law and seek to do by indirection what cannot be done by the townships directly. The answer to your first question is that townships cannot adopt ordinances limiting the kind of arms or ammunition to be used or their discharge so as to interfere with or restrict the hunting of wild birds and animals with firearms permitted and prescribed by State law. Townships contemplating the passage of firearms ordinances should exempt hunters as was done by Flint Township.

OAG, 1961-62, No 3659, p 375-378 (April 16, 1962), App 1a-4a (emphasis added).

The courts below have been distracted by the fact that the local ordinances do not specifically state that hunting is prohibited, but instead simply prohibit the discharge of all firearms and bow and arrow. But this Court has appropriately recognized that a preemption analysis does not depend solely on whether a local ordinance or regulation uses the same words as an otherwise controlling statute. Rather, the test is whether the ordinance "permits what the statute prohibits or the ordinance prohibits what the statute permits." *See, e.g., Llewellyn* at 322 n 4; 257 NW2d 902 (1977). Focusing on an ordinance's terminology allows local governments to simply wordsmith their way around state laws intended to preempt local power, a result that has grave implications for the balance of power in this and many other contexts, and one that will

result in a patchwork of inconsistent regulation. In any event, the Legislature has drafted a statutory scheme that gives the DNR the power to regulate hunting and the discharge of firearms and bows. *See, e.g.,* MCL 324.41901(1) (DNR has power "to regulate and prohibit hunting, and the discharge of firearms and bow and arrow"). Accordingly, the rationale articulated in *Cadillac*'s *dicta* should be rejected.

C. A city's power to prohibit firearm discharges within its jurisdiction does not diminish the DNR's exclusive authority to regulate hunting.

The City of Saginaw has relied on its police power and MCL 123.1104 to support its ordinances. MCL 123.1104 is part of a firearms and ammunition act that "stripped local units of government of all authority to regulate firearms by ordinance or otherwise with respect to the areas enumerated in the statute . . . [and] remove[d] from local units of government the authority to dictate where firearms may be taken." *Michigan Coal of Responsible Gun Owners v Ferndale*, 256 Mich App 401, 413-414; 662 NW2d 864, 871-872 (2003). MCL 123.1104 did provide a narrow exception for local regulation of firearms, stating that "this Act does not prohibit a city or charter township from prohibiting the discharge of a pistol or other firearm within the jurisdiction of that city or charter township." However, that statute should not be read as a blanket authorization for cities to prohibit the discharge of firearms in a manner that interferes with lawful hunting. On the contrary, MCL 123.1104 must be read in conjunction with the statutes giving the DNR the exclusive authority to regulate hunting and firearms.

It is a well-established that "[w]hen two statutes relate to the same subject or share a common purpose, they are *in pari materia* and must be read together as one law, even if they make no reference to one another and were enacted on different dates." *Michigan Coal of Responsible Gun Owners*, 256 Mich App at 416; 662 NW2d 864 (emphasis added) (citing *Jackson Cmty Coll v Dep't of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000)). Here,

the purpose of MCL 324.41901 is to authorize the DNR to "regulate and prohibit hunting and the discharge of firearms and bow and arrow . . . on those areas established under this part," while the purpose of MCL 123.1104 is to provide for a narrow exception to the general prohibition on local regulation of firearms. Reading the statutes together, it is clear that while the Legislature generally permits local governments to prohibit the discharge of firearms, local governments may enact such prohibitions when they affect hunting only by complying with MCL 324.41901, which states that "[w]henever the governing body of any political subdivision determines that the safety and well being of persons or property are endangered by hunters or the discharge of firearms or bows and arrows, by resolution it may request the department to recommend closure of the area."

To reiterate, MCL 123.1104 preserves a local government's authority to prohibit the discharge of pistols and firearms generally, but MCL 324.41901 provides the exclusive means by which a city may enact such a prohibition and apply it to hunting that the DNR would otherwise permit. The City of Saginaw has failed to submit a resolution to the DNR, and has not otherwise complied with the requirements set forth in MCL 324.41901. The ordinances are therefore invalid as applied to lawful hunting.[3]

II. The City of Saginaw's Ordinances Are Also Field Preempted.

The City's ordinances are also preempted (to the extent they prohibit hunting) by the state's extensive regulation of the field of hunting and hunting safety. A local government is

[3] In addition, even the City does not claim that MCL 123.1104 pertains to bows and arrows. *See* MCL 123.1104 ("this Act does not prohibit a city or charter township from prohibiting the discharge of a pistol or other firearm within the jurisdiction of that city or charter township") (emphasis added). Since MCL 123.1104 has no application to bows and arrows, and the City of Saginaw has no statutory authorization to prohibit their discharge within the city limits, the ordinance is *per se* invalid with respect to bows and arrows, regardless of its validity in regulating firearms.

precluded from enacting an ordinance if "the State statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even if there is no direct conflict between the two schemes of regulation." *Llewellyn*, 401 Mich at 322; 257 NW2d 902.

Here, the Legislature granted the DNR "the exclusive authority to regulate the taking of game." MCL 324.40113a(2). This grant of exclusive authority is consistent with decisions of this Court, which have long held that the Legislature has the power to regulate the taking of game within the State as to time, place, and method:

> As owner of wild game and fish the State may permit the taking thereof on terms and conditions and restrict their subsequent use . . . . [I]t . . . is within the police power of the State Legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in such fish and game, even to the extent of restricting the use of or right of property in the game after it is taken or killed; and such statutes have been enacted in probably all jurisdictions.

People v Zimberg, 321 Mich 655, 659; 33 NW2d 104 (1948) (quotations omitted); *accord People v Setunsky*, 161 Mich 624; 126 NW 844 (1910).

A comprehensive scheme of State regulation has accompanied a long history of State control over the taking of game, dating back to at least 1921, when the Legislature created the Conservation Department, which succeeded to the powers and duties of the State Game Commissioner. (OAG 1961-62, No. 3659, at 376, App 2a.) While the name of the responsible agency has changed over the years, the regulation of hunting and firearms is no less pervasive now than it was in 1961, when the Michigan Attorney General opined that "the legislature has occupied the entire field of game regulations, including the manner of taking game and the type of guns to be used. It would appear that in doing so the legislature has also legislated in the field

of firearm safety." *Id*. And because the City's ban has the effect of banning hunting, the regulatory field committed solely to the DNR, it is field preempted.

One need only peruse the statutes granting power to the DNR (*see* MCL 324.40113a, *et seq*.) and the voluminous regulations of that department (*see* Mich Admin Code r 281.51–322.72.1) to conclude that the state has extensively and completely regulated the entire field of hunting, including the use of firearms and bow and arrow in the taking of game. It is statutorily recognized that the "wildlife populations of the state . . . are of paramount importance to the citizens of this state," MCL 324.40113a(1)(a), and that the "sound scientific management of the wildlife populations of the state" is "in the public interest." MCL 324.40113a(1)(b). The Legislature's enactment of MCL 324.41901 furthers that purpose, ensuring that only the DNR—not local governments—will have the ability to completely close an area to hunting.

It is wholly appropriate for the state to have exclusive control over the taking of game, because the management of the state's wildlife population requires uniform regulation, as evidenced by the statutory scheme the Legislature enacted. A patchwork of varying local regulations would likely prevent the state from achieving effective population management, as wildlife generally has little regard for political boundaries. If all of Michigan's political subdivisions were permitted to enact a *de facto* ban on hunting by passing ordinances such as the City of Saginaw's, the ability of the DNR to manage wildlife would be severely impaired.

III. MCL 324.41701 Through 41703 Lend Further Support to Czymbor's Preemption Argument.

This Court wisely directed the parties' attention to MCL 324.41701 through 41703, which authorize the DNR to grant licenses for game bird hunting preserves. As an initial matter, these provisions yet again confirm the DNR's preemptive authority over local ordinances. *See, e.g.*, MCL 324.41702 ("Game bird hunting preserves licensed under this

section may allow hunting on Sundays, notwithstanding the provisions of a local ordinance or regulation."). Moreover, the Court's directive led ineluctably to additional authority that supports Czymbor's preemption argument.

The only decision interpreting MCL 324.41701 *et seq*. is an unpublished Michigan Court of Appeals opinion, *Milan Township v Jaworski*, 2003 WL 22872141 (Mich Ct App, Dec 4, 2003). The defendant in *Milan* was licensed by the DNR to operate a bird preserve. The Milan Township Zoning Ordinance required the defendant to seek a special use permit, and when he applied for that permit, the Township denied it. When the defendant continued to operate his preserve, the Township filed suit. The Township conceded that while neither hunting nor the raising or selling of game birds violated the local ordinance, the defendant's act of charging a fee for hunting rendered the preserve a "commercial recreation area," an activity requiring special approval. *Id.* at *1.

The court first held that the local zoning ordinance was not preempted by the game preserve statutes, which (1) did not purport to regulate the "location of commercial hunting reserves," and (2) only permitted such activity when performed "by adhering to all requirements." MCL 324.41704. *Id.* at *3. The court also held that the local zoning ordinance was not field preempted, because the "field regulated by the ordinance is zoning"; "the ordinance does not license or in any way regulate the taking of game on the preserve." *Id.* Critical to the court's conclusion, however, was the fact that the zoning ordinance neither prevented the DNR's issuance of a hunting license, nor prohibited the defendant's taking of game:

> [I]f plaintiff disallows a hunting preserve, the ordinance does not preclude a license or in any way regulate the taking of game on the preserve; it simply determines that the hunting preserve cannot operate on the proposed property.

Id. (emphasis added).

Here, the City of Saginaw's ordinance does "preclude a license" and the taking of game on private property, a direct conflict with State law, as noted above. And the City's ordinances do not relate to zoning, but the discharge of firearms and bow and arrow, the very regulatory area that is supposed to be within the DNR's exclusive authority.

The *Milan* court then went on, holding that the zoning ordinance was preempted by Michigan's Right to Farm Act, MCL 286.471 *et seq.* ("RFTA"), because the game preserve was a protected commercial farm operation. Czymbor's farming activity is also commercial, meaning the City's ordinances are likewise preempted by the RFTA. And the *Milan* court's observations about the nature of that preemption are illuminating:

> This conclusion does not leave local government without recourse if it has public safety concerns that it seeks to address by ordinance. MCL 286.474(7) provides:
>
> > A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government . . . .

Id. at *5 n 3 (emphasis added). MCL 286.474(7) is the RTFA analogue to MCL 324.41901(1), which likewise authorizes a local unit of government to petition the DNR to close an area to hunting when that government unit "determines that the safety and well-being of persons or property are endangered by hunters or discharge of firearms or bow and arrows." As the Court of Appeals properly recognized in *Milan*, such a procedure provides a safety valve to the local government, but one that can be exercised only by petitioning the DNR. It makes no sense, in either situation, that a city would be able to unilaterally ban the very conduct the DNR is supposed to regulate, all the while ignoring the very specific procedures the Legislature proscribed for a local government that wants to prohibit conduct State law otherwise permits.

CONCLUSION

The Legislature has given expansive regulatory authority to the DNR to regulate the taking of game and the discharge of firearms and bows and arrows. If a local government like the City of Saginaw determines that the safety and well-being of persons or property are endangered by hunting or the discharge of firearms and bows and arrows, the Legislature has prescribed one way for the local government to address the issue: a request that the DNR initiate a public process and promulgate prohibitory regulations that the local government may also adopt. If a local government can sidestep this process simply by enacting an ordinance that prohibits generally the discharge of all firearms and bows and arrows within its jurisdiction, the statutory scheme the Legislature enacted serves no purpose, and a recreational and commercial activity that contributes more than $1.3 billion annually to Michigan's economy[4] will exist solely at the whim of local officials, not the State agency the Legislature entrusted.

For all of these reasons, Czymbor's respectfully requests that this Court reverse the Michigan Court of Appeals, hold the City's anti-discharge ordinances preempted because they do not contain an exception for the taking of game, and remand for entry of judgment in favor of Czymbor's.

Dated: September 15, 2006

WARNER NORCROSS & JUDD LLP

By /s/ John J. Bursch

John J. Bursch (P57679)
Joseph M. Infante (P68719)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2474
616.222.2474 (fax)
Counsel for Plaintiffs-Appellants

1298339-6

[4] *See* http://www.michigan.gov/dnr/0,1607,7-153-10366-121641--.00.html (visited 3/8/06).